

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

TANYA HEILMAN, ETHAN SMITH, and)
BERNARD POWERS, on behalf of)
themselves and ALL OTHERS)
SIMILARLY SITUATED,)

No. CV-11-0038-HU

Plaintiffs,)

vs.)

**FINDINGS AND RECOMMENDATION
ON MOTION TO DISMISS**

FIRST AMERICAN PAYMENT SYSTEMS, LP,)
dba ELIOT MANAGEMENT GROUP,)

Defendant.)

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Attorneys for Defendant

1 HUBEL, United States Magistrate Judge:

2 On January 12, 2011, the plaintiffs filed this action against
3 their former employer asserting individual and class claims for the
4 defendant's alleged violations of Oregon and Colorado minimum wage
5 and hour laws. They also asserted claims for breach of contract,
6 unjust enrichment, injunctive and declaratory relief, and an
7 accounting. Dkt. #1. The plaintiffs alleged jurisdiction in this
8 case based on diversity. *Id.*, ¶ 2.5.

9 After the suit was filed, counsel for the parties conferred
10 and "agree[d] that the amount in controversy for the named
11 plaintiffs is less than \$75,000," and "the putative class damages
12 are far less than the \$5 million dollars necessary for CAFA
13 jurisdiction." Dkt. #19, Ex. A (letter from Plaintiffs' counsel to
14 the undersigned dated February 28, 2011). The parties therefore
15 agreed that this court "lacks subject matter jurisdiction," *id.*,
16 and they asked the court to dismiss the case.

17 The plaintiffs argued "an involuntary dismissal should be
18 entered without prejudice and without costs or attorney fees to
19 either party." *Id.* The plaintiffs would not agree to dismiss the
20 case voluntarily because they want to take advantage of Oregon's
21 "savings statute" that would allow the same action to be filed in
22 state court within 180 days after an involuntary dismissal in this
23 court, with the claims in the re-filed action relating back to the
24 date the current action was initiated for statute of limitations
25 purposes. See ORS § 12.220 (the "savings statute"). The defendant
26 objected to an involuntary dismissal, asserting that because the
27 plaintiffs agreed this court lacks jurisdiction, they should
28 dismiss the case voluntarily.

2 - FINDINGS AND RECOMMENDATIONS

1 In a March 4, 2011, telephonic status conference, the court
2 advised the parties that it would not issue a *sua sponte* dismissal
3 order, and they should file an appropriate motion. On March 17,
4 2011, the plaintiffs filed an Amended Complaint, adding additional
5 claims based on Oregon state law. Dkt. #14. In the Amended
6 Complaint, the plaintiffs again asserted diversity jurisdiction.
7 *Id.*, ¶ 2.5.

8 The matter now is before the court on the defendant's Motion
9 to Dismiss, supporting brief, and Declaration of Maryann Yelnosky,
10 Dkt. #17, #18 & #19, to which the plaintiffs have responded, Dkt.
11 #20, and the defendant has replied, Dkt. #22. In the motion, the
12 defendant asks the court "for an order requiring Plaintiffs to
13 voluntarily dismiss this case since Plaintiffs have conceded this
14 court lacks jurisdiction." Dkt. #18, p. 1. In the alternative,
15 the defendant asks the court to include in its dismissal order
16 "findings that Plaintiffs conceded that they knew this court lacked
17 jurisdiction over the claims set out in their complaint and filed
18 an amended complaint in federal court alleging diversity
19 jurisdiction even after they conceded this court lacked such
20 jurisdiction." *Id.*, p. 2. As to the defendant's latter request,
21 the factual chronology set forth above speaks for itself.

22 The court has discretion to dismiss a case with or without
23 prejudice. See Fed. R. Civ. P. 41(a)(2); *Diamond State Ins. Co. v.*
24 *Genesis Ins. Co.*, 379 Fed. Appx. 671, 672-73 (9th Cir. 2010)
25 (citing *Hargis v. Foster*, 312 F.3d 404, 412 (9th Cir. 2002)).
26 However, the court has located no authority, and the defendant has
27 cited none, that would allow the court to order the plaintiffs to
28 dismiss their case "voluntarily." Indeed, as the plaintiffs

1 correctly observe, an order requiring them to "voluntarily" dismiss
 2 their case would not result in any voluntary action on their part
 3 at all.

4 The issue of whether or not the plaintiffs' actions in this
 5 case should prevent the relation back of any newly-filed state
 6 court action is one to be resolved by the state court. The only
 7 issue before this court is whether the court has jurisdiction of
 8 the action pursuant to 28 U.S.C. § 1332(a). As the parties
 9 asserting diversity jurisdiction, the plaintiffs "bear the burden
 10 of establishing by a preponderance of the evidence that the amount
 11 in controversy exceeds \$75,000." *In re Ford Motor Co./Citibank*
 12 *(South Dakota), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001) (citing
 13 *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir.
 14 1996)). Here, the plaintiffs concede that the amount in
 15 controversy is less than \$75,000, and the court lacks subject
 16 matter jurisdiction. See Dkt. #19, Ex. A.

17 Accordingly, the defendant's motion to dismiss must be
 18 granted, and the case must be dismissed without prejudice.*

20 **SCHEDULING ORDER**

21 These Findings and Recommendations will be referred to a
 22 district judge. Objections, if any, are due by **July 5, 2011**. If
 23 no objections are filed, then the Findings and Recommendations will
 24

25
 26 *The defendant requested oral argument on its motion to
 27 dismiss. Given that the motion concerns only the single issue of
 28 whether the court has jurisdiction, and the parties agree that the
 amount in controversy does not meet the jurisdictional minimum, the
 court finds oral argument is unnecessary to resolve the motion, and
 the defendant's request for oral argument is denied.

1 go under advisement on that date. If objections are filed, then
2 any response is due by **July 22,2011**. By the earlier of the
3 response due date or the date a response is filed, the Findings and
4 Recommendations will go under advisement.

5 IT IS SO ORDERED.

6 Dated this 16th day of June, 2011.

7 /s/ Dennis J. Hubel

8

Dennis James Hubel
9 Unites States Magistrate Judge